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IN THE

Supreme Court of the United States

OCTOBER TERM 1944

No. 178

JAMES ORVILLE COUCHOIS,
Petitioner,

against

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND BRIEF IN SUPPORT OF PETITION

OSMOND K. FRAENKEL,
Counsel for Petitioner.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, James Orville Couchois, respectfully represents and petitions for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit as follows:

Summary Statement

Petitioner seeks review of the judgment of the United States Circuit Court of Appeals for the Fifth Circuit affirming the judgment of the District Court for the Southern District of Alabama sentencing defendant to a term of imprisonment for five years following a verdict of guilty found by a jury (R. 25) of the crime of attempting to interfere with the armed forces of the United States

in violation of §33, Title 50 of the United States Code Annotated.

The prosecution was based on certain oral statements alleged to have been made by petitioner. Petitioner denied having made any of these statements and contended, moreover, that the statements were not sufficient to justify conviction. Because petitioner's assigned trial counsel failed to move for a directed verdict the sufficiency of the evidence is probably not open to review in this Court. Therefore the only basis on which this petition is sought is the failure adequately to provide petitioner with [redacted] representation by counsel.

The facts are as follows: Petitioner was a merchant seaman whose permanent home was in Detroit, Michigan (R. 62, 64). He was a member of the crew of the steamship "West Nohno" which had been on a nine-month voyage (R. 42). Shortly after this vessel arrived in Mobile, Alabama, in February, 1943, petitioner was arraigned before a United States Commissioner charged with having brought obscene literature into the United States and was then taken before the Steamboat Inspection Agency to answer why his seaman's papers should not be revoked (R. 11). At that hearing testimony was given by certain members of the crew and of the naval gunners crew assigned to the vessel concerning statements attributed to petitioner (R. 11, 12). The Steamboat Inspection Agency then revoked his papers (R. 12). About a month later petitioner was taken before the United States Commissioner and charged with sedition (R. 12). In the meantime the crew of the vessel had been paid off (R. 12). During all this period petitioner had been in jail and had not been represented by counsel (R. 11, 12).

After petitioner was released on bail he communicated in Mobile with an attorney who represented his union, and then went to New York in a further effort to induce the union to take charge of his case (R. 13). Petitioner was under the impression that the union would furnish him with an attorney (R. 13, 14).

The trial was first set for some time in July (the exact date is not given in the record—R. 15). In the meantime petitioner had made various efforts to have his witnesses subpoenaed. The members of the crew had, of course, scattered after having been paid off. Petitioner corresponded with the District Attorney and the District Judge on the subject and gave a list of the witnesses to certain agents of the Federal Bureau of Investigation, who offered their services to help locate witnesses (R. 14, 15). However, petitioner was informed that the witnesses could not be subpoenaed at governmental expense because they were more than 100 miles distant from the place of trial (R. 13, 15). The case was then continued until August 2, 1943 (R. 15).

Some time after the first adjournment petitioner received a letter from the District Attorney confirming this trial date and stating that if petitioner was not ready he should write the judge. This petitioner did. He received an answer that the request for continuance could not be granted as it had been received too late (R. 16).

When the case was called on the morning of August 2, 1943, petitioner was without a lawyer (R. 16). The Court at about 11 o'clock appointed Mr. Samuel W. Pipes III to represent petitioner (R. 16, 32). Petitioner had never seen Mr. Pipes prior to this appointment (R. 16). Mr. Pipes immediately asked for an adjournment to give him time to confer with petitioner, to prepare the case and to obtain the attendance of witnesses (R. 18, 32). The Court refused to do this, but recessed from 12 o'clock until 2.30 (R. 19, 32). The trial began in the afternoon of the 2nd and lasted until the afternoon of the 6th (R. 19). The Court was in session between 9.30 in the morning and 5, sometimes 6 o'clock at night (R. 19).

After the judgment of conviction petitioner made a motion for a new trial on the ground, among other things, that he had not been properly represented by counsel (R. 10). This motion was supported by his own affidavit (R. 11-17) and that of Mr. Pipes (R. 18-21). No affidavits in

opposition were filed. The motion was denied in the District Court without the writing of any opinion (R. 24). In the Circuit Court of Appeals an opinion was written by Judge Hutcheson (R. 92 ff.).

The Opinion Below

The opinion below has not yet been officially reported. Judge Hutcheson stressed the fact that the trial had not begun until nearly six months after the indictment and that no showing had been made at the trial of the names of witnesses desired or as to what could be proved by them. He said that under such circumstances an adjournment would not have been required had petitioner been represented by counsel of his own choosing; he could see no difference because counsel had been chosen by the Court. He said that to reach a different conclusion would be to require the suspension of the rules governing the orderly administration of justice whenever a defendant required the Court to appoint counsel for him.

Jurisdiction

The jurisdiction of this Court is invoked under §240(a) of the Judicial Code, as amended, 43 Stat. 938, 28 U. S. C. A., §347(a). The judgment of the Circuit Court of Appeals was entered on April 22, 1944. Timely application for rehearing was made, which was denied on May 23, 1944.

Question Presented

1. Whether the provision of the Sixth Amendment guaranteeing counsel in all criminal trials has been complied with where the Court appoints counsel previously unknown

to defendant and without experience in the particular class of case involved, denies a request by counsel for an adjournment to enable counsel to familiarize himself with the case and forces an immediate trial.

Reasons Relied On for the Allowance of the Writ

The Circuit Court of Appeals has decided an important question of Federal law and constitutional law at variance with previous decisions of this Court and decisions of State courts of last resort. The Circuit Court of Appeals in its approach to the problem has dealt with the case as though it were one which arose in a State court where the only criterion to be applied is whether due process has been afforded the defendant. This is apparent from the Court's reliance on *Avery* v. *Alabama*, 308 U. S. 444. No mention is made of *Glasser* v. *United States*, 315 U. S. 60, where this Court held that the provisions of the Sixth Amendment had not been complied with where the same lawyer was appointed to represent conflicting interests and refused to speculate on what the result of the trial might have been had there been proper representation. The correct rule is laid down in *People* v. *McLaughlin*, 291 N. Y. 480.

Wherefore, petitioner prays that a writ of certiorari issue out of and under the seal of this Court directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding that Court to certify and send to this Court for review and determination, as provided by law, this cause and a complete transcript of the record and of all proceedings had therein, and that the order of the United States Circuit Court of Appeals affirming the judgment of conviction in this case may be reversed, and that

petitioner have such other and further relief in the premises as this Court may deem proper.

Dated, June 15, 1944.

OSMOND K. FRAENKEL,
Counsel for Petitioner.

I hereby certify that I have examined the foregoing petition for a writ of certiorari and that in my opinion it is well founded and the cause is one in which the petition should be granted.

OSMOND K. FRAENKEL,
Counsel for Petitioner.